

No. 7843

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15

**United States**

**Circuit Court of Appeals**

**For the Ninth Circuit.**

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WILLIAM R. MACKLIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**Transcript of Record**

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division.

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FILED

JUN 14 1935

PAUL P. QUINN,



No. 7843

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

MESSRS. WINTER S. MARTIN,

and

HARRY S. REDPATH,

605 Colman Building,

Seattle Washington,

MESSRS. LEWIS & CHURCH,

Port Angeles, Washington,

Attorneys for Appellant.

MESSRS. J. CHARLES DENNIS

and

GERALD SHUCKLIN,

222 Post Office Bldg.,

Seattle, Washington,

Attorneys for Appellee. [1]\*

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States District Court, Western District of  
Washington, Northern Division.

November Term, 1934

No. 43521

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM R. MACKLIN,

Defendant.

### INDICTMENT

United States of America  
Western District of Washington,  
Northern Division—ss:

Violation Sections 404 and 1181, Title 26, U.S.C.A.

The grand jurors of the United States of America  
being duly selected, impaneled, sworn, and charged  
to inquire within and for the Northern Division of  
the Western District of Washington, upon their  
oaths present: [2]

### COUNT I.

That WILLIAM R. MACKLIN, whose true Chris-  
tian name is to the Grand Jurors unknown, on or  
about the sixteenth day of July, in the year of Our  
Lord one thousand nine hundred thirty-four, at the  
City of Port Angeles, in the Northern Division of  
the Western District of Washington, within the jur-  
isdiction of this Court, and within the Internal Rev-



venue Collection District of Washington, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously remove and aid and abet in the removal of approximately three (3) gallons of moonshine whiskey, on which the tax due the Government of the United States had not then and there been paid, to those certain premises located at Port Angeles, Washington, known as 424 East 11th Street, a place other than a bonded warehouse provided by law, and did then and there conceal, and aid in the concealment of the said moonshine whiskey so removed; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

## COUNT II.

That WILLIAM R. MACKLIN, whose true and full name is to the grand jurors unknown, on or about the sixteenth day of July, in the year of our Lord, one thousand nine hundred thirty-four, at the City of Port Angeles, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, [3] did then and there knowingly, wilfully, unlawfully and feloniously remove, deposit and conceal, with intent to defraud the United States of the internal revenue taxes due thereon as fixed by law, at those certain premises known as, to-wit: 424 East 11th Street, at the City of Port Angeles, Washington, to-wit: three (3) gallons of moonshine whiskey; con-

trary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. CHARLES DENNIS

United States Attorney

GERALD SHUCKLIN

Assistant United States Attorney

A True bill.

B. F. BLACKBURN

Foreman

J. CHARLES DENNIS

U. S. Attorney

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and FILED in the U. S. DISTRICT COURT Dec. 8, 1934.

EDGAR M. LAKIN

Clerk

By TRUMAN EGGER

Deputy [4]

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[Title of Court and Cause.]

### ARRAIGNMENT AND PLEA.

Now on this 10th day of December, 1934, Gerald Shucklin, Assistant United States District Attorney, appearing for the plaintiff and Winter S. Martin, Esq., appearing as counsel for the defendant, on request the personal recognizance of the defendant stands until the arrival of bond given before the

United States Commissioner at Port Angeles, arrives, which bond with the consent of the United States District Attorney may then stand as bail herein. Defendant William R. Macklin is arraigned and answers that his true name is William R. Macklin. He enters a plea of not guilty to the indictment, with leave to move or demur to the indictment. Said cause is to be placed on the assignment calendar.

Journal No. 22

Page 627. [5]

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District Court of the United States, Western District  
of Washington, Northern Division

No. 43521

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM R. MACKLIN

Defendant.

VERDICT

WE, THE JURY IN THE ABOVE-ENTITLED CAUSE, FIND the defendant WILLIAM R. MACKLIN is guilty as charged in Count I of the Indictment herein; and further find the defendant WILLIAM R. MACKLIN not guilty as charged in Count II of the Indictment herein.

CHAS. T. SKINNER

Foreman.

[Endorsed]: Filed Mar. 27, 1935. [6]

[Title of Court and Cause.]

### TRIAL RESUMED

Now on this 27th day of March, 1935, Gerald Shucklin, Assistant United States District Attorney, appearing for the plaintiff and Winter S. Martin, Esq., appearing as counsel for the defendant, the jury returns into court at 10 A. M. with a sealed verdict which is as follows, to wit: "We, the jury in the above-entitled cause, find the defendant WILLIAM R. MACKLIN is guilty as charged in Count I of the Indictment herein; and further find the defendant WILLIAM R. MACKLIN not guilty as charged in Count II of the Indictment herein. Chas. T. Skinner, Foreman." All jurors, defendant and counsel are present. The verdict is received, read, acknowledged by the jury, and the jury polled at request of the defendant, each juror answering that the verdict as read is his verdict. The verdict is ordered filed and the jury is excused from the case. The defendant's counsel orally moves for arrest of judgment and for a new trial, and that sentence be deferred. Motions in writing are directed to be filed, and Monday, April 8, 1935, is set as a time for hearing the same, and for judgment and sentence. The defendant is permitted to go on his present recognizance.

Journal No. 22,

Page 851 [7]



[Title of Court and Cause.]

**MOTION FOR NEW TRIAL.**

Comes now the defendant Macklin and moves for a new trial upon the several grounds as follows, towit:

(1) The Court erred in denying defendant's motion for a directed verdict of acquittal at the close of the Government's case.

(2) The Court erred in denying a similar motion for directed verdict of acquittal at the close of the defendant's case for the reason that there was no competent evidence or evidence of any kind or description which showed that Macklin had not paid the tax due on said three gallons of liquor. That the failure to pay tax on the three gallons of liquor was the gist of the offence and it was the duty on the part of the Government to allege and prove this fact towit: That the tax had not been paid by Macklin.

(3) The Court erred in failing to give the instructions requested on the part of the defendant to which defendant duly excepted at the close of the trial.

(4) The comment by Prosecutor on the failure of the defendant to take the witness stand was prejudiced error which requires a new trial.

(5) The acquittal of Count Two must of itself discharge the defendant as a matter of law.

**WINTER S. MARTIN**

Attorney for Defendant.

Received a copy of the within Motion this 3 day of Apr. 1935.

J. CHARLES DENNIS

Atty for Pltff.

[Endorsed]: Filed Apr. 3, 1935. [8]

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[Title of Court and Cause.]

### ORDER

Now on this 8th day of April, 1935, Gerald Shucklin, Assistant United States District Attorney, appearing for the plaintiff and Winter S. Martin, Esq., appearing as counsel for the defendant, this cause comes on for hearing on motion for new trial and sentence of the defendant, and the same is ordered continued over one week.

Journal No. 22

Page 878 [9]

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[Title of Court and Cause.]

### HEARING.

Now on this 15th day of April, 1935, Gerald Shucklin, Assistant United States District Attorney, appearing for the plaintiff and Winter S. Martin, Esq., appearing as counsel for the defendant, this cause comes on for hearing on motion for new trial. The same is argued by counsel for the defendant and the motion is denied. Exception is allowed.

Journal No. 22

Page 888. [10]

In the United States District Court for the Western  
District of Washington, Northern Division.

No. 43521

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM R. MACKLIN,

Defendant.

SENTENCE.

Comes now on this 15th day of April, 1935, the said defendant, William R. Macklin, into open court for sentence, and being informed by the court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and the premises, it is considered, ordered, and adjudged by the court that the defendant is guilty of removing and aiding and abetting in the removal of certain whiskey on which the tax due the Government of the United States had not then and there been paid as charged in count 1 of the indictment in violation of Section 404, Title 26, U.S.C.A. and that he be punished by being committed to the custody of the Attorney General of the United States, or his authorized representative for imprisonment in the Clallam County Jail at Port Angeles, Washington, or in such other prison as may be hereafter provided

for the confinement of persons convicted of offenses against the laws of the United States, for the period of four (4) months; and that he pay a fine of \$500.00. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

The defendant's attorney, Mr. Martin, asks that the defendant be allowed his liberty for a few days on his present bond until steps are taken to perfect appeal herein. The request is granted and commitment is stayed for five days and the Court permits the defendant to remain at liberty under present bond, during that time the defendant either to take steps to perfect his appeal or surrender himself to custody if appeal is not taken within said time.

### Judgment & Decree

Vol. 9, Page 180. [11]

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[Title of Court and Cause.]

### HEARING.

(Defendant released on bail)

Now on this 18th day of April, 1935, Gerald Shucklin, Assistant United States District Attorney, appearing for the plaintiff and Winter S. Martin, Esq., appearing as counsel for the defendant, the defendant, WILLIAM R. MACKLIN, having served and filed notice of appeal and grounds of appeal now appears in open court and orally moves for an entered order fixing appeal bond herein in the same



amount as fixed in bond for his appearance before this Court, to-wit, \$750.00, and with the same sureties, and it is so ordered if the bond is satisfactory to the United States District Attorney, upon the justification thereon.

Journal No. 22.

Page 896 [12]

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[Title of Court and Cause.]

PROCEEDINGS

(Showing issuance of Copy of Notice of Appeal and Docket entries to Appellate Court.)

\* \* \* \* \*

April 18, 1935 Issue Copy of Notice of Appeal and Copy of Docket entries to C. C. A.

\* \* \* \* \*

Criminal Docket No. 25

Page 221. [13]

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[Title of Court and Cause.]

DEFENDANT'S NOTICE OF APPEAL TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE 9TH CIRCUIT.

1. Name and Address of Appellant are:—

William R. Macklin, 535 West Fourth Street  
Port Angeles, Washington.

2. Names and addresses of appellant's attorneys are:—

Winter S. Martin, 605 Colman Building,  
Seattle, Wash.,

Harry S. Redpath, 605 Colman Building,  
Seattle, Wash.,

Lewis & Church, Port Angeles, Washington.

3. Offense

The indictment was drawn in two counts.

#### COUNT ONE.

This count charged defendant with violating section 404 U.S.C.A. Title 26 in that the defendant at Port Angeles, Washington within the Northern Division of the Western District of Washington, on or about July 16th, 1934, did unlawfully and feloniously remove three gallons of moonshine whiskey, on which the tax due the Government of the United States had not then and there been paid, to those certain premises located at Port Angeles, Washington known as 424 East 11th street, a place other than a bonded warehouse provided by law, and did then and there conceal and aid in [14] the concealment of the said moonshine whiskey so removed, contrary to the form of the statute in such case made and provided.

See Section 404, Title 26 U.S.C.A. being R. S. 3296.

#### COUNT TWO.

This count charged the defendant with violating section 1181, Title 26, U.S.C.A. in that the defendant

at Port Angeles, Washington within the Northern Division of the Western District of Washington on or about July 16th, 1934, did unlawfully and feloniously remove and aid and abet in the removal of three gallons of moonshine whiskey on which the tax due the government of the United States had not then and there been paid, to the premises No. 424 East 11th Street a place other than a bonded warehouse provided by law and did then and there conceal said moonshine whiskey so removed contrary to the Statute in such case made and provided.

This section 1181 of Title 26 U.S.C.A. is Sec. 3450 of the Revised Statutes.

#### 4. Date of Judgment

Defendant was convicted of count one and found not guilty of Count two. Judgment and sentence was entered April 15, 1935 by the Honorable John C. Bowen, United States District Judge.

5. Defendant was adjudged to serve four months in Clallam County Jail at Port Angeles, Washington or at any other institution selected by the Attorney General and authorized by law. Defendant was also fined \$500.00 (Five Hundred Dollars) and required to stand committed until paid.

6. Defendant was enlarged on bail pending taking and perfecting his appeal, and required to furnish his bond on appeal after filing notice of Appeal. Said defendant is now at large on bail.

I, the above named appellant hereby appeal to the United States Circuit Court of Appeals for the 9th

Circuit, from the judgment [15] above mentioned on the grounds set forth below.

WILLIAM R. MACKLIN

Appellant

Dated this 18th day of April, 1935.

### GROUND OF APPEAL.

The Government produced and offered four witnesses, two of whom were the arresting officers who testified under oath that on the evening of July 16th 1934, they went upon the rear of the premises numbered 424 East 11th Street in the city of Port Angeles and arrested the defendant Macklin as he stepped out of his automobile. They found three one-gallon glass containers, each containing one-gallon of alcohol whiskey. There was no tax stamp, label, mark, brand, or any printed or written notice of any kind on each or any of the containers. There was nothing on each or any container to indicate whether a tax of any kind had been paid upon the container or its contents. The containers were plain white bottles without identifying mark of any kind thereon.

No evidence of any kind was offered by the Government as to the non-payment of the Revenue Tax due thereon to the United States. The Government rested its case. Defendant did not take the stand and offered no evidence of any kind. At the close of the Government's case in chief and again after defendant closed without taking the witness stand and without offering proof, defendant moved for a directed verdict of acquittal upon the ground that



there was not a scintilla of evidence to sustain the material allegation of the Indictment, that the tax on said three gallons of moonshine whiskey so unlawfully [16] removed had not been paid. There was nothing on said containers to indicate that the tax had not been paid. The court denied each motion to all of which defendant then and there duly excepted which exception was by the Court allowed and noted.

The cause was then submitted to the jury which subsequently returned a verdict of guilty on count one, and not guilty of count two.

Before the jury retired to consider the case, and immediately after the Court had charged the jury, defendant excepted to the refusal of the court to instruct the jury as requested which exceptions were allowed and noted. Defendant will extend this matter of error in the refusal to instruct, in defendants assignments of error on this appeal.

In addition to the error in denying defendant's motion for a directed verdict of acquittal and the court's refusal to instruct as requested, duly excepted to when denied, viz: on the ground that the non-payment of the Government tax is the gist of the offense described in Sec. 404 Title 26 U.S.C.A. and the entire absence of proof of non-payment of tax in the Government's case required an acquittal the finding of not guilty in count two is the legal equivalent of not guilty in count one because only one *signle* offense was charged in each of said counts and the gist of the offense in each count was identical viz: there was but one removal of spirits to the premises 424 East 11th Street, Port Angeles. There was one

arrest at which time three one-gallon containers full of alcohol whiskey was found. The gist of the offense of count one was the gist of the offense charged in count two. The counts were identical in this respect. The jury in finding defendant not guilty under count two of any intent to defraud the United States in the matter of the payment of the tax, by the act of removing said liquor to [17] the identical premises mentioned in count one must be held to have exonerated the defendant of guilt under count one. A felonious removal of said three gallons of non-tax paid liquor was the gist of each offense.

Dated at Seattle, April 18, 1935.

Respectfully submitted

WINTER S. MARTIN

Of Counsel

Attorney for Appellant

WILLIAM R. MACKLIN

Appellant.

Copy received April 18, 1935.

J. CHARLES DENNIS

U. S. Attorney

GERALD SHUCKLIN

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 18, 1935. [18]

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[Title of Court and Cause.]

ORDER.

It appearing to the undersigned trial judge that the appellant above named on the 18th day of April,

1935, filed with the Clerk of this court a notice of appeal in the above entitled cause,

NOW THEREFORE, in pursuance of the Rules of Practice and Procedure in Criminal Cases adopted by the Supreme Court of the United States on May 7, 1935.

IT IS ORDERED that the above named appellant or his attorney and the United States Attorney do appear before the undersigned trial judge on the 22nd day of April, 1935, at 10:00 o'clock a.m. at the City of Seattle, in the Court Room of said Court, for such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings; and as to the time for the filing of an assignment of the errors of which the appellant complains if the record on appeal is to be without a bill of exceptions; as to the preparation and filing of the bill of exceptions and the settlement of the same by the undersigned trial judge; as to the contents of the transcript of record on said appeal and as to the time for the filing of said record with the clerk's certificate in the United States Circuit Court of Appeals for the Ninth Circuit, and as to all other matters pertinent to said appeal.

It is further ordered that the clerk of this court do forthwith serve a certified copy of this notice by

mail on the appellant or his attorney and on the United States Attorney for this District.

Dated Seattle, April 18, 1935.

JOHN C. BOWEN  
District Judge.

[Endorsed]: Filed Apr. 18, 1935. [19]

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[Title of Court and Cause.]

### BAIL BOND ON APPEAL

We, William R. Macklin, as principal, and E. E. Nichols and Mrs. William R. Macklin, as sureties, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of seven hundred fifty dollars (\$750.00) to be levied of our own goods and chattels, lands and tenements, upon this condition:

WHEREAS, the said William R. Macklin has appealed from the judgment and sentence of the above entitled court in said above cause entered heretofore on the 15th day of March, 1935, to the United States Circuit Court of Appeals for the 9th Circuit,

Now, therefore, if the said William R. Macklin shall prosecute his appeal with effect and personally be and appear before the said District Court when required to do so from day to day and term to term thereafter until the determination of said appeal and shall abide by and perform any order or judgment which may be rendered therein in said cause by the



District Court and/or the Circuit Court of Appeals for the 9th Circuit and shall not depart this district without leave thereof then this obligation to be void; otherwise to remain in full [20] force and virtue.

WITNESS OUR HANDS AND SEALS THIS  
19th DAY OF APRIL, 1934.

[Seal] WILLIAM R. MACKLIN

[Seal] E. E. NICHOLS

[Seal] MRS. WILLIAM R. MACKLIN

APPROVED THIS 20th day of April, 1935.

J. CHARLES DENNIS

United States Attorney

By GERALD SHUCKLIN,

Asst. U. S. Atty.

TAKEN AND APPROVED THIS 20th day of  
April, 1935.

[Seal] JOHN C. BOWEN

United States District Judge

Approved

W. BRUMFIELD

U. S. Comm'r [21]

United States of America

Western District of Washington

Northern Division—ss.

MRS. WILLIAM R. MACKLIN, being individually sworn, and being a surety on the annexed recognizance, deposes and says: That she resides at Port Angeles, in the County of Clallam, State of Washing-

ton in the above described District; that she is a freeholder in the said County and State and is the owner in fee simple (and in her own sole and separate right) of Lot Twelve (12) in Block Seventy-four (74) of the Townsite of Port Angeles, Washington.

E. E. NICHOLS, being individually sworn, and being a surety on the annexed recognizance, deposes and says: That he is a widower and resides at Port Angeles, in the County of Clallam, State of Washington, in the above described District; that he is a freeholder in said County, State and District; and is the owner in fee simple of Lot Three (3) in Block Eighty-seven (87) of the Townsite of Port Angeles, Washington;

And each of these affiants being individually sworn for themselves, depose and say: That they are worth the sum of Seven Hundred and Fifty Dollars (\$750.00) over and above all just debts and liabilities, in property subject to execution and sale, and exclusive of exemption by law from levy and sale under execution, and that their property consists of the above described real estate.

MRS. WILLIAM R. MACKLIN  
E. E. NICHOLS

Sworn to before me and subscribed in my presence  
this 19th day of April, 1935.

[Seal]           DEVILLO LEWIS

Notary Public in and for the State of Washington,  
residing at Port Angeles.

[Endorsed]:   Filed Apr. 20, 1935. [22]

[Title of Court and Cause.]

PROCEEDINGS.

(Showing Lodging of Bill of Exceptions)

\* \* \* \* \*

April 23, 1935, Lodged Deft's Bill of Exceptions.

\* \* \* \* \*

(Criminal docket No. 25

Page 221.) [23]

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[Title of Court and Cause.]

ORDER

Now on this 25th day of April, 1935, Gerald Shucklin, Assistant United States District Attorney, appearing for the plaintiff and Winter S. Martin, Esq., appearing as counsel for the defendant, the United States District Attorney not objecting request of counsel for the defendant for further time to settle bill of exceptions is granted and time is ordered extended until Monday, May 6, 1935.

Journal No. 22.

Page 909 [24]

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[Title of Court and Cause.]

HEARING.

(Order Extending Time)

Now on this 6th day of May, 1935, Gerald Shucklin, Assistant United States District Attorney, ap-

pearing for the plaintiff and Winter S. Martin, Esq., and Mr. Redpath, appearing for the defendant, this cause comes on for settling bill of exceptions, directions re appeal record. Proposed amendments are filed. The bill of exceptions and proposed amendments are considered by the Court, the bill settled and signed.

On motion of the defendant an order is entered extending the November 1934 Term of Court for thirty days for all purposes pertaining to appeal. On motion of the defendant an order is entered granting thirty days from date to file record on appeal with the Clerk of the Appellate Court.

Journal No. 22,  
Page No. 932 [25]

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[Title of Court and Cause.]

### ASSIGNMENT OF ERROR.

Comes now the defendant in the above cause and assigns the following errors to be presented in his appeal, to-wit:

#### I.

The Court erred in denying defendant's motion for a directed verdict of acquittal submitted

- a. at the close of plaintiff's case;
- b. at the close of all the evidence after defendant rested his case. See Bill of Exceptions P. 30.

II.

The Court erred in denying defendants requested instructions numbered one, two and three to which refusal defendant duly excepted which exceptions were allowed and noted. See Bill of Exceptions P. 36.

III.

The Court erred in overruling Defendant's motion for new trial and in arrest of judgment upon the grounds stated in the written motion to which denial by the Court, defendant duly excepted.

WHEREFORE, defendant prays that his appeal be granted.

DATED AT SEATTLE Washington, this 23rd day of April, 1935.

WINTER S. MARTIN

Of Counsel for Defendant.

Copy of these assignments rec'd this 23rd day of April, 1934.

J. CHARLES DENNIS

U. S. Attorney.

[Endorsed]: Filed Apr. 23, 1935. [26]

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[Title of Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that the Grand Jurors of the United States of America being duly selected, im-



paneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths presented on December 8th, 1934, an indictment in two counts charging the defendant William R. Macklin with having violated sections 404 and 1181 Title 26, U.S.C.A. That defendant William R. Macklin upon the 10th day of December, 1934, was arraigned in person before the above entitled court and then and there pleaded not guilty to each of the said counts in said indictment.

Be it further remembered that on the 26th day of March, 1935, this said cause came on for trial before the Honorable John C. Bowen, one of the judges of said court. A jury therein was duly sworn to try said cause.

The United States to maintain the issues on its part called as a witness, one,

CLYDE J. SHAW,

who being first duly sworn, testified under oath as follows, to wit:—

“That he was employed by the United States as an investigator in the Alcohol Tax Unit of the Bureau of Internal Revenue; that early in the evening of July 16, 1934, while so employed at Port Angeles, Washington, he was parked in an auto in the [27] vicinity of the alley in the rear of No. 424 East 11th Street in said Port Angeles. That Mr. C. J. Gibbs, an investigator in the employ of the Alcohol Tax Unit of the Bureau of Internal Revenue accompanied him in his automobile.

That the witness observed two automobiles, one following the other, to enter the alley back of the premises 424 East 11th Street. There was one man in each car. That the first car to enter the alley was a Buick. Defendant driving a 1933 Chevrolet followed the other car into the alley. That the driver of the Chevrolet, afterward ascertained to be the defendant Macklin, drove from the alley in the rear of 424 East 11th street into and upon the rear of the premises 424 East 11th Street. That he brought his car to a stop and had just stepped out of his car carrying a carton containing empty one-gallon jugs when the witness and his brother officer drove in back of the premises and came to a stop a few feet from the Macklin car. Witness and officer Gibbs jumped out of their car and immediately stepped over to the Macklin car. The witness looked into the car and saw cartons, and bottles which indicated to him that the driver of the car had liquor in the car. That he immediately placed said driver under arrest. He searched the Chevrolet auto and there found some five or six empty one-gallon jugs and three full one-gallon glass jugs containing alcohol whiskey.

That the Government at this point produced a one-gallon glass container which was full of what the witness said was alcohol whiskey. This one-gallon container bore no tax stamp, receipts, mark or label of any kind except the Exhibit mark placed thereon after defendant Macklin's arrest. The said three-one-gallon containers were made of white glass and when seized bore no identifying mark of any kind

thereon. There was no mark, tag, label, or anything upon the said container to indicate that the tax had or had not been paid on the contents. Neither the containers nor the cartons bore tax stamps or labels of any kind at the time of the arrest.

That witness asked Mr. Macklin whose liquor that was, and [28] Macklin said it was his. Witness asked Macklin what kind of liquor it was. Macklin replied that it was alcohol whiskey.

In addition to the one-gallon container offered in evidence, *wutbess testufued* that two other one-gallon bottles each full of the same kind of liquor were found in Macklin's auto, at the same time. Each container was without any label or tag, or other mark. That the witness said that the officers remained at No. 424 East 11th street with Mr. Macklin in their custody for about fifteen minutes. That they then placed Mr. Macklin in their auto and took him to the Clallam County Jail at Port Angeles. That at the sheriff's office at the jail, Mr. Macklin was searched and found to have \$326.00 in his possession.

The witness was asked by defendants attorneys in substance:

Q. When you were waiting in the vicinity of 424 East 11th Street, were you waiting for Mr. Macklin?

The witness answered

A. No.

Q. Then Mr. Macklin was not the man that you had under suspicion and he was not the man you were waiting for.



Witness replied in the negative. Asked by Mr. Martin of defense counsel why he followed the Macklin car witness replied that he was watching all cars that were passing in that vicinity for the reason that he had received information that liquor would be transported to the place in question and that when the two cars came along and entered the alley he thought it best to investigate them. When he drove into the alley witness followed for the purpose of finding out who they were. That before making the arrest as the witness approached the Macklin car he could see containers and one-gallon bottles in the car. Witness said that Macklin told them he used to work as a shingle weaver but couldn't do that kind of work any more."

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The Government called as its next witness:

"C. J. GIBBS

who was duly sworn and upon his oath testified in substance to the same facts as testified to by witness C. J. Shaw with the exception that he stated that he and Shaw had been [29] with Macklin about one hours time in the rear of the premises of 424 East 11th Street, Port Angeles. He further testified that the three gallons of alcohol whiskey had been brought by him to Seattle, Washington and there turned over to custodian A. D. Sides of the Bureau of Internal Revenue Alcohol Tax Unit."

The Government then called

MR. A. D. SIDES

who being first duly sworn in the above cause upon his oath testified in substance :

“That he was employed by the United States as an investigator of the Alcohol Tax Unit of Internal Revenue. That the three gallons of Alcohol whiskey had been turned over to him as custodian by officers Shaw and Gibbs. He identified the exhibit as one of the three containers turned over to him and testified that these containers had been in his possession until turned over to M. S. Strubin his succeeding custodian. He testified that no marks, stamps, or labels had been upon any of the bottles other than the identification label placed thereon by the Bureau of Internal Revenue after the arrest of Macklin. He further testified over objection of Macklin’s counsel that the exhibit contained alcohol whiskey and that he had tested the same.”

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“M. F. SBRUBIN

called as the last witness for the prosecution being first duly sworn in the above cause upon his oath said in substance :

“That he was an employee of the United States as an investigator in the Alcohol Tax Unit of the Bureau of Internal Revenue. That he had succeeded A. D. Sides as the custodian of property for the alcohol tax Unit of Internal Revenue and received the three containers from custodian A. D. Sides, had

given his receipt therefor, and had had the same in his custody up to the time of trial when the exhibit was produced in court.”

At the conclusions of the testimony of these four witnesses above mentioned, the Government rested its case in chief. Whereupon defendant by his counsel moved the court to instruct the [30] jury to return a verdict of not guilty for the reason that the failure to pay the Government tax upon the three gallons of moonshine liquor constituted the gist of the offense under each count of the indictment to wit: Section 404 and 1181 Title 26 U.S.C.A. That under section 266 of Title 26 U.S.C.A. viz:—

“All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States.”

Under five gallons in any one container a wholly different rule applies. Intoxicating liquor in any container under five gallons is presumed to have been tax paid and the burden in such cases is upon the United States to prove that the tax on the said container containing less than five gallons had not been paid.

That there was not a scintilla of evidence in the Government's case pertinent to the question whether the tax had or had not been paid. There was absolutely no evidence of the non-payment of the tax. There was in each count of the indictment a material

allegation to the effect that the said tax upon said three gallons of moonshine liquor had not then and there been paid together with the further allegation, that the purpose and intent on the part of the defendant was to defraud the United States of its revenue which it would have received if the tax had been paid. Said motion was denied by the Court to which rule of the court the defendant then and there duly excepted which exception was noted of record by said court.

That the defendant then and there declined to testify in person and declined to offer any testimony in his behalf. That the Government offered no further evidence after the defendant had rested its case. That thereupon defendant renewed his motion to instruct the jury to return a verdict of not guilty for the same reasons offered when a similar motion was made at the close of the Government's case in chief. The court denied the motion [31] made at the close of the testimony to which ruling of the court the defendant then and there duly excepted which exception was noted by the court. That after the argument of counsel the Honorable court charged the jury as follows:

#### INSTRUCTION No. 1

“In this case there is one defendant on trial on two counts of the indictment. In each of these counts the defendant has entered a plea of not guilty, which places upon the prosecution the burden of showing beyond a reasonable doubt



the truth of every material allegation of the accusation on which he is tried.

In this case you will consider each count of the indictment separately, and if you have a reasonable doubt under the evidence of any material allegation of the count of the indictment you are considering, it is your duty to acquit as to that count; if you have no such reasonable doubt concerning any such allegation, it is your duty to convict as to the allegation you are considering."

#### INSTRUCTION No. 2

A reasonable doubt is just such a doubt as the term implies; a doubt for which you can give a reason. Not speculative, imaginary, or conjectural. It is such a doubt as when experienced by a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at a conclusion. It may be a doubt which is created by a want of evidence or it may be by the evidence itself. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the parties charged.

#### INSTRUCTION No. 3

The defendant William R. Macklin is charged with violating the internal revenue laws of the United States. Count I charges that the defendant on or about the 16th day of July, 1934,

at the city of Port Angeles, Washington, knowingly, wilfully, unlawfully and feloniously removed and aided and abetted in the removal of approximately three gallons of moonshine whiskey on which the tax due the government of the United States had not then and there been paid to premises located at 424 East 11th Street in that city when it is claimed these premises were other than a bonded warehouse provided by law, and that he then and there concealed and aided in the concealment of the moonshine whiskey so removed.

Count II charges that on the same date at the same place the defendant did knowingly, wilfully, unlawfully and feloniously remove, deposit and conceal approximately three gallons of moonshine whiskey with intent to defraud the United States of the Internal Revenue tax due thereon as fixed by law at the said premises known at 424 East 11th Street, Port Angeles, Washington. [32]

If you find that the acts alleged in the indictment have not been proved beyond a reasonable doubt, then it is your duty to find the defendant not guilty. However, if you find that the acts alleged in the indictment have been proved beyond a reasonable doubt, then it is your duty to find the defendant guilty.”

#### INSTRUCTION No. 4

“Intent is an ingredient of crime. It is psychologically impossible for you to enter into

the mind of the defendant and determine the intent with which he operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all of the circumstances disclosed by the witnesses as testified to bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified, on the ground of innocent intent. The color of the act determines the complexion of the intent.”

#### INSTRUCTION No. 5

“There are two kinds of evidence. Direct or positive, and circumstantial. Now, direct and positive testimony is that which a person observes or sees or which is susceptible of demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable conclusion. Now, circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the parties charged; inconsistent with their innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character, it is alone sufficient to convict. You will review all

the circumstances in the light of this instruction.”

#### INSTRUCTION No. 6

“I instruct you that every person charged with crime is presumed to be innocent until the jury is convinced of guilt by evidence beyond every reasonable doubt. This presumption of innocence attaches to every act and expressed thought of the accused and remains with him throughout the trial until the case is committed to you. And it continues into your deliberations in the jury room until the proof submitted upon the entire case convinces you of his guilt beyond every reasonable doubt.”

#### INSTRUCTION No. 7

“I instruct you that the failure to testify creates no inference of Guilt. The presumption of innocence requires this: The defendant is entitled to have the government prove its case by evidence which convinces the jury of the guilt of the accused beyond every reasonable doubt, independently of whether the accused takes the stand or not.” [33]

#### INSTRUCTION No. 8

“You are instructed that you are the sole and exclusive judges of the evidence in this case. You must determine what the facts in the case are. You are likewise the sole and exclusive judges of the credibility of the witnesses who



have testified before you, and in determining the weight or credit you desire to attach to the testimony of any witness, you will take into consideration the reasonableness of the story, the opportunity of the witnesses for knowing the things about which they have testified, the interest or lack of interest in a particular witness in the result of this trial; surround each witness with all the circumstances disclosed, all the testimony given here, and then determine who told the truth.”

#### INSTRUCTION No. 9

“The indictment in this case will be sent to the jury room with you merely to show you the paper charge against the defendant, but is not to be considered as evidence. You will take with you to the jury room the exhibit in the case. The verdict is in the usual form. Before the word “guilty” is a blank, and you will write in there “is” or “not” as you find. It will require your entire number to agree upon a verdict, and when you have agreed you will cause your verdict to be signed by your foreman, whom you will elect from among your number immediately upon retiring to the jury room.”

which said charge of the court above set forth comprised all of the instructions given to the jury in said cause. Defendant having duly presented at the opening of the trial three requested instructions now at the close of the court’s charge and while court was

in session and before the jury had retired from the jury box to consider said case, defendant in presence of the court and jury duly excepted to the refusal of the court to give defendant's requested instructions No. 1, 2, and 3 which were as follows towit:

#### INSTRUCTION No. 1

"I instruct that where less than five gallons of intoxicating liquor are found in any one container or vessel, and the said container, vessel or receptacle bears no revenue stamp thereupon showing the payment of tax, the law presumes that the tax was paid and it then becomes the duty of the government to prove beyond every reasonable doubt that the tax upon said liquor had not been paid. Proof of non-payment must appear in the case without regard to any stamp on the bottle, jug or container."

#### INSTRUCTION No. 2

"I instruct you to return a verdict of not guilty in this case for the reason that there is no evidence in this case that the tax on this liquor has not been paid." [34]

#### INSTRUCTION No. 3

"I instruct you that upon the Government's case which is now closed it is your duty to return a verdict of not guilty to each of the counts of this indictment. You will remain in your jury box and your foreman will sign the verdict of not guilty."

That the court then and there noted defendant's exception to its refusal to so instruct and allowed the same.

That the court then submitted said cause to the jury which after due deliberation returned its verdict of guilty as charged under Count one and not guilty of Count two. Verdict was entered on March 27, 1934. Thereupon on said day Defendant moved for a new trial and in arrest of Judgment in substance towit:

“That there was no evidence to support the allegations of the indictment that the tax had not been paid and that by reason thereof, motions for a directed verdict should have been granted.”

“That prejudicial error resulted from the Court's refusal to instruct as requested and that the finding of not guilty under Count two operated as a matter of law to discharge defendant under Count one notwithstanding the verdict.”

The court continued the hearing on motion for new trial until April 8th 1935 and upon April 8th 1935 again continued said cause until April 15th for hearing motion, and on said day denied same, and thereupon the Court imposed judgment and sentence of the Court which is of record in said cause.

The court after sentence considered the matter of bail pending appeal and ruling that it was a proper case for bail admitted defendant to bail.

And forasmuch as the evidence and proceedings and matters of exception above set forth do not fully

appear of record, the defendant by his attorney tenders this bill of exceptions and prays that the same be signed and sealed by the court here, pursuant to the statute in such case made and provided.

Which is done accordingly this 6th day of May, 1935.

JOHN C. BOWEN

Trial Judge

Copy of the Bill of Exceptions received this 23rd day of April 1935.

J. CHARLES DENNIS

*Assistant U. S. Attorney*

[Endorsed]: Filed Apr. 23, 1935. [35]

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[Title of Court and Cause.]

PRAECIPE FOR APPELLATE RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are hereby requested to take a transcript of record to be filed in the United States Court of Appeals for the 9th Circuit pursuant to an appeal taken and noticed in the above entitled cause and to include in such transcript of record the following papers and documents, to wit:—

1. Indictment.
2. Plea of Not Guilty December 10, 1934. Journal Record.



3. Verdict of jury acquitting defendant of count 2 and finding him guilty of count 1 as charged in the indictment.

4. Journal entry March 27 showing oral motion for new trial and arrest of judgment immediately upon return of verdict.

5. Written motion for new trial.

6. Journal entry continuing hearing on motion for new trial from April 8 to April 15.

7. April 15th motions for new trial and in arrest of judgment denied.

8. Judgment and sentence of the court April 15, 1935.

9. Journal entry fixing amount of appeal bond and enlarging defendant on bail.

10. Journal entry copy of notice of appeal and docket entries sent to San Francisco by Clerk of District Court. [36]

11. Notice of Appeal filed and served April 18th.

12. Clerk prepared Court order entered April 18 fixing April 22 re the time within which to prepare and file assignment of errors and to settle and allow bill of exceptions.

13. April 20, 1934 bail bond on appeal approved and filed.

14. Clerk's entry noting bill of exceptions lodged in clerk's office, April 23.

15. April 25 journal order continuing time to settle bill of Exceptions to May 6th.

16. Bill of Exceptions settled and signed.

17. Order extending time.

18. Order extending time to lodge record.



19. Copy of this praecipe.
20. Clerk's Certificate to record.

WINTER S. MARTIN

Of Counsel for Defendant

Copy of within praecipe received

J. CHARLES DENNIS

Attorney for plaintiff.

[Endorsed]: Filed May 10, 1935. [37]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD ON  
APPEAL.

United States of America,  
Western District of Washington—ss:

I, EDGAR M. LAKIN, Clerk of the above entitled Court, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 37 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as the same remain of record and on file in my office, as is required by praecipe of counsel filed and shown herein, with the exception of the Bill of Exceptions and Assignments of Error, the originals of which are transmitted with this transcript; and that the foregoing constitute the record on appeal herein from the judgment of said United States Dis-

trict Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 20th day of May, 1935.

[Seal]

EDGAR M. LAKIN,

Clerk, United States District Court, Western  
District of Washington,

By TRUMAN EGGER

Deputy. [38]

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[Endorsed]: No. 7843. United States Circuit Court of Appeals for the Ninth Circuit. William R. Macklin, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed May 22, 1935.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

